IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1315

ROBERT CALHOUN, JR.,
Appellant,

—against—

H. SPENCER KUPPERMAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS APPEAL

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Appellee Skadden, Arps, Slate, Meagher & Flom ("Skadden, Arps") moves the Court, pursuant to Rule 16(1)(a) of the *Revised Rules of the Supreme Court,* to dismiss the appeal in the above-captioned action on the ground that that appeal is not within the Court's appellate jurisdiction. Recognizing that the Court may regard the Appellant's improvidently taken appeal as a petition for writ of certiorari, pursuant to 28 U.S.C. § 2103, the Appellee Skadden, Arps also submits that the above-captioned action presents no substantial federal question meriting the exercise of the Court's certiorari jurisdiction.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Second Circuit, issued on December 3, 1976, is presented in Appendix A of the Appellant's Jurisdictional Statement.

The unreported opinion of the United States District Court for the Southern District of New York, issued on November 11, 1975 in Docket No. 75 Civ. 3748, is presented in Appendix B of the Appellant's Jurisdictional Statement.

JURISDICTION

On February 3, 1977, the Appellant filed with the Court a Jurisdictional Statement noting an appeal from the decision of the Court of Appeals for the Second Circuit. That Jurisdictional Statement was placed on the Court's appellate docket as No. 76-1315.

The Jurisdictional Statement, however, does not base this Court's jurisdiction upon any provision establishing an appellate jurisdiction, but rather relies upon Section 1254(1) of Title 28 of the *United States Code*, a provision establishing this Court's certiorari jurisdiction over cases in the Courts of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

Whether the Court of Appeals properly affirmed the District Court's dismissal of Appellant's complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*, on the grounds that:

(a) the Appellant lacked standing to sue on behalf of an alleged injury to the civil rights of his former wife; and

(b) the Appellant's complaint did not allege any cause of action arising under federal law.

STATEMENT OF THE CASE

The Appellant appeals from an order of the United States Court of Appeals for the Second Circuit, affirming the District Court's dismissal of the Appellant's complaint for lack of standing and failure to state a cause of action.

The Parties

The Appellant, Mr. Robert Calhoun, Jr., is the former husband of Alice M. Calhoun.* Mrs. Calhoun was the plaintiff in a civil rights action in the District Court for the Southern District of New York, entitled *Alice M. Calhoun* v. *Riverside Research Institute* (S.D.N.Y. 71 Civ. 2734)** to which the Appellant was *not* a party. In the *Alice M. Calhoun* action Mrs. Calhoun had alleged that the defendants therein had discriminated on the basis of her race in their employment of her, in violation of Title VII of the Civil Rights Act of 1964. That action was dismissed, upon a $5,900 payment to Mrs. Calhoun in settlement of her claim. That settlement was fully supervised by and reviewed in open hearing by a judge of the District Court for the Southern District, before the order of dismissal was issued.

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* A judgment of divorce was issued by the New York Supreme Court, Queens County, on September 9, 1975 in *Alice M. Calhoun* v. *Robert Calhoun* (Index No. 9866/75).

** The Appellant sought to prosecute an appeal from an order of the United States District Court in the *Alice M. Calhoun* case. The Second Circuit dismissed Mr. Calhoun's appeal for lack of jurisdiction (Case No. 75-7415) and this Court denied Mr. Calhoun's petition for a writ of certiorari on March 8, 1976 (Case No. 75-1022).

The Appellees are, except for Skadden, Arps, Slate, Meagher & Flom ("Skadden, Arps"), the attorneys who represented Mrs. Calhoun and the several defendants in the *Alice M. Calhoun* action. Skadden, Arps is apparently included in this action because several individual associate attorneys of Skadden, Arps (named in the caption but not served with the complaint) had, in their individual capacities, represented Mrs. Calhoun in that action on a *pro bono* basis, in substitution for her earlier counsel.

The Complaint

The complaint, filed in the District Court for the Southern District of New York on July 31, 1975, purported to base the Appellant's claims on the Civil Rights Act of 1964, on 42 U.S.C. § 1983, on 18 U.S.C. §§ 241-42, and on this Court's decision in *Greenwood* v. *Peacock*, 384 U.S. 808 (1966).

The factual basis of the vaguely drafted complaint was set forth in the following allegations:

> "The plaintiff claims that the defendants did conspire together in the litigation of a Civil Rights action (71 Civ. 2734 Alice M. Calhoun vs Riverside Research Institute and Columbia University) to do harm to him and his wife. The defendants are charged with carrying out a conspiracy that caused his wife to lose the damages that were warranted in her action." Complaint, ¶ II.

In reviewing the complaint, the District Court took judicial notice of the earlier settlement proceedings before the United States District Court in the *Alice M. Calhoun* action.* *Despite* the eminent fairness of that judicially supervised settlement, the Appellant Mr. Calhoun (*not* Mrs. Calhoun) sought by the com-

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* Relevant portions of the transcript of the District Court's approval of the settlement in the *Alice M. Calhoun* action are quoted in the District Court's subsequent opinion in the present action. (See App. A. to Jurisdictional Statement.)

plaint in the current action to accuse all the counsel involved of a conspiracy to deprive Mrs. Calhoun of "the damages that were warranted in her action."

Proceedings Below

After oral argument in chambers on September 17, 1975, the District Court on November 11, 1975 granted the Appellees' motions to dismiss the complaint for lack of standing and for failure to state a cause of action. The District Court also denied the Appellant's summary judgment motion as moot. These rulings were affirmed by the Court of Appeals for the Second Circuit on December 3, 1976 in an opinion that adopted the opinion of the District Court.

ARGUMENT

I. The Jurisdictional Statement Should Be Dismissed Because It Does Not Present a Matter Within the Court's Appellate Jurisdiction.

The Court of Appeal's affirmance of the dismissal of Appellant's complaint involved no ruling to invalidate a state statute or other state authority. Thus, the Appellant is not, as required by 28 U.S.C. § 1254(2) for the invocation of the Court's appellate jurisdiction over the Courts of Appeals,

> a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . . .

Since the Court's appellate jurisdiction does not extend to this action, the appeal should be dismissed.

II. The Jurisdictional Statement, if Treated as a Petition for Writ of Certiorari, Should be Denied.

If the Court decides, pursuant to 28 U.S.C. § 2103, to treat the Jurisdictional Statement as a petition for writ of certiorari,

the Court should then deny the petition.* The Court of Appeal's decision, for which the Appellant seeks this Court's review, is consistent with decisions in other Courts of Appeals and presents no substantial question of federal law.

A. The Court of Appeals Correctly Affirmed the District Court's Ruling that the Appellant Had No Standing to Object to the Legal Representation Afforded Mrs. Calhoun.

The Court of Appeals affirmed the dismissal of Appellant's complaint by adopting the District Court's opinion, which concluded that the Appellant lacked standing to sue for the alleged violations of his former wife's civil rights. The District Court ruled that

> It is the general rule that an individual cannot sue for the deprivation of another's civil rights. [citations omitted] Only Mrs. Calhoun is in a position to raise any wrongs to her. The statement that Mr. Calhoun was in turn harmed does not cure this defect.

Appellees submit that this ruling is consistent with previous decisions by this Court and by other federal courts, and presents no significant federal question meriting the Court's review.

In the *Alice M. Calhoun* action that was the basis for the Appellant's complaint, Skadden, Arps had no attorney-client relationship with the Appellant. *Mrs.* Calhoun was the client of individual associate attorneys at Skadden, Arps. Only Mrs. Calhoun (and *not* the Appellant) was a party in that action, which involved *no* alleged injury to the Appellant's civil rights.

The principle is well established that only the party aggrieved may complain of any infringement to his constitutional

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* In that event, the Appellee Skadden, Arps requests that its Motion to Dismiss Appeal be treated by the Court as an Opposition to the Petition for Writ of Certiorari.

rights. As Chief Justice Warren stated in *McGowan* v. *Maryland*, 366 U.S. 420 (1961):

> "Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities,' *United States* v. *Raines*, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 529, 80 S. Ct. 519, we hold that appellants have no standing to raise this contention." *Tileston* v. *Ullman*, 318 U.S. 44, 46, 87 L. Ed. 603, 604, 63 S. Ct. 493. 366 U.S. at 429 (footnote omitted).

See also Warth v. *Seldin*, 422 U.S. 490 (1975).

The Courts of Appeals have also consistently rejected the notion that one may base his own standing on the claim that the civil rights of another have been violated. For example, in *O'Malley* v. *Brierley*, 477 F.2d 785 (3d Cir. 1973), the court stated that:

> "[A] litigant may only assert his own constitutional rights or immunities," *United States* v. *Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 523, 4 L. Ed. 2d 524 (1960); *McGowan* v. *Maryland*, 366 U.S. 420, 429, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), and . . . "one cannot sue for the deprivation of another's civil rights." C. Antieau, Federal Civil Rights Acts, Civil Practice, § 31 at 50-51. 477 F.2d at 789 (footnote omitted).

See also Coxson v. *Godwin*, 405 F. Supp. 1099 (W. D. Va. 1975); *Javits* v. *Stevens*, 382 F. Supp. 131 (S.D.N.Y. 1974). Courts have held that plaintiffs lack standing to sue for another person's loss of civil rights even where the plaintiffs have also alleged some resulting emotional or other injury to themselves. *See Evain* v. *Conlisk*, 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd mem.* 498 F.2d 1403 (7th Cir. 1974); *Curtiss* v. *Peerless Insurance Co.*, 299 F. Supp. 429 (D. Minn. 1969).

B. The Dismissal of Appellant's Complaint was also Correct Because the Complaint Failed to State a Cause of Action.

The Appellant's complaint alleged causes of action under 42 U.S.C. § 1983, 18 U.S.C. §§ 241 and 242, and the Civil Rights Act of 1964.* Those statutory provisions, as they have each been interpreted by this Court and various Courts of Appeals, provide no cause of action for the injuries alleged by the Appellant.

1. The Appellant Had No Cause of Action Under 42 U.S.C. § 1983.

A cause of action under 42 U.S.C. Section 1983 is only available to a plaintiff who establishes that his civil rights were deprived by a defendant acting under "color of any statute, ordinance, regulation, custom, or usage of any State or Territory." *See Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970). Decisions in the Courts of Appeals have consistently held that an attorney's participation even in a state judicial proceeding (rather than a federal judicial proceeding as in the *Alice M. Calhoun* action) does not render him an official acting under color of state law for purposes of Section 1983. *See Fine* v. *City of New York*, 529 F.2d 70 (2d Cir. 1975); *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971); *Dotlich* v. *Kane*, 497 F.2d 390 (8th Cir. 1974); *Hill* v. *McClellan*, 490 F.2d 859 (5th Cir. 1974); *Page* v. *Sharpe*, 487 F.2d 567 (1st Cir. 1973); *Szijarto* v. *Legeman*, 466 F.2d 864 (9th Cir. 1972); *Steward* v. *Meeker*, 459 F.2d 669 (3d Cir. 1972). Thus, it is settled as a matter of law that Section 1983 provides no cause of action on the basis

* The Complaint also alleged a cause of action under this Court's decision in *Greenwood* v. *Peacock*, 384 U.S. 808 (1966). In *Greenwood*, this Court reviewed certain applications of the federal removal statutes, specifically 28 U.S.C. §§ 1443(1) and (2). That opinion, however, provides no basis for jurisdiction or a cause of action. Indeed, in *Greenwood* this Court *reversed* a decision to allow removal to a District Court.

of the Appellant's allegations about the misrepresentation of his former wife by individual attorneys at Skadden, Arps.*

2. The Appellant Had No Cause of Action Under 18 U.S.C. §§ 241 and 242.

The Appellant's complaint also attempted to allege a cause of action on the basis of Sections 241 and 242 of Title 18 of the United States Code. Those sections prohibit (and provide criminal sanctions for) certain specified conduct in violation of any person's civil rights.** It has been uniformly held, however, that these statutes create only criminal liabilities, and provide no private cause of action for civil remedies. *See United States ex rel. Savage* v. *Arnold*, 403 F. Supp. 172 (E.D. Pa. 1975); *Conklin* v. *Barfield*, 334 F. Supp. 475 (W.D. Mo. 1971); *Spotted Eagle* v. *Blackfeet Tribe of the Blackfeet Indian Reservation*, 301 F. Supp. 85 (D. Mont. 1969); *Sinchak* v. *Parente*, 262 F. Supp. 79 (W.D. Pa. 1966); and *Copley* v. *Sweet*, 133 F. Supp. 502 (W.D. Mich. 1955), *aff'd*, 234 F.2d 660 (6th Cir.), *cert. denied*, 352 U.S. 887 (1956).

* While a cause of action against a private person may be permitted under Section 1983 where it has been established that the private person acted in conspiracy with a state official, the Appellant has made no allegation of such conspiracy. The complaint only alleges a conspiracy among the Appellees, who are all attorneys in private practice and not state officials. The complaint alleges that "this scheme was carried out under color of the United States District Court at Foley Square, New York." Even if that allegation was intended to allege a conspiracy with federal officials, that allegation would not establish a cause of action under Section 1983 since that Section does not apply to the federal officials. *See Bivens* v. *Six Unknown Agents of Fed. Bur. of Narc.*, 456 F.2d 1339 (2d Cir. 1972); *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964).

** Section 241 prohibits conspiracies to restrict any person's exercise of rights secured by the Constitution and federal laws. Section 242 prohibits anyone, acting under color of state law, from interfering with another's rights under the Constitution and federal laws.

3. The Appellant Had No Cause of Action Under the Civil Rights Act of 1964.

The Appellant's complaint also alleged a cause of action under the Civil Rights Act of 1964,* although without any citation or reference to any specific provision of that Act. While that Act provides various remedies and sanctions for interference with specific rights arising under the Constitution and federal laws, it provides no private cause of action or other remedy applicable to the facts alleged by the Appellant. Thus the Civil Rights Act claims of Appellant's complaint were appropriately dismissed.**

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* 42 U.S.C. §§ 1971, 1975a to d, 2000a to h-6.

** The Civil Rights Act of 1964 provides remedies for interferences with the right to vote (Section 1971), discrimination in the provision of public accommodations and facilities (Sections 2000a through 2000b-3), discrimination in public education programs (Sections 2000c through 2000c-9), discrimination by participants in federally assisted programs (Section 2000d through 2000d-6) and discrimination in employment practices (Sections 2000e through 2000e-17).

CONCLUSION

The Appellant's Jurisdictional Statement should be dismissed or, if treated by the Court as a petition for writ of certiorari, should be denied.

Respectfully submitted,

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Dated: April 19, 1977

IN THE

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Appellant,

—against—

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Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Vaughn C. Williams, being duly sworn, deposes as follows:

1. On the 19th day of April, 1977, I served three copies of the attached Motion to Dismiss on each party to the above-captioned appeal by depositing three true copies

of the same, enclosed in postage prepaid envelopes addressed to

Robert Calhoun, Jr.
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40 Wall Street
New York, New York 10005

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551 Fifth Avenue
New York, New York 10019

in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/s/

VAUGHN C. WILLIAMS

Sworn to before me this
19th day of April, 1977.

/s/

NOTARY PUBLIC

FRED A. MANFREDONIA
Notary Public, State of New York
No. 30-4913012
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires March 30, 1979